UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RODNEY M. TOOTHACRE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 07CV2289 DMS (WMC)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS
[Doc. 11]

This matter comes before the Court on Defendant's motion to dismiss Plaintiff's Complaint. Pursuant to stipulation, Plaintiff's claim for temporary restraining order was dismissed with prejudice on February 26, 2008. Defendant filed the instant motion to dismiss the balance of Plaintiff's claims on February 28, 2008.[1] Plaintiff filed an opposition and Defendant replied. The Court heard oral argument on May 9, 2008, at which time Caroline Newman appeared telephonically for the United States and Plaintiff appeared on his own behalf. For the reasons set forth below, Defendant's motion is granted in part and denied in part.

[1] Plaintiff sued both the United States of America and the Internal Revenue Service ("IRS"). The IRS, however, is not an entity that is subject to suit. *See Murphy v. United States, et al.,* 493 F.3d 170, 173 (D.C. Cir. 2007). Accordingly, the IRS is dismissed from the lawsuit and the United States is substituted as the proper defendant.

I.

BACKGROUND

This case arises out of certain tax liens placed on Plaintiff's residence to secure payment of taxes due in 1993 and 1994. Believing these liens were time-barred, Plaintiff sent the Internal Revenue Service ("IRS") a "notice of intent to sue" letter on April 6, 2006, and a supplemental letter on May 16, 2006. In these letters, Plaintiff claimed the pendency of the tax liens caused delay in closing escrow on a loan refinance because the liens encumbered the collateral (*i.e.,* his residence) for the loan. (Def. Ex. L, Doc. 11-14 at 4-5). Plaintiff further expressed his intention to seek costs and "all damages incurred, including but not necessarily limited to compensatory damages and general damages for emotional distress." (*Id.* at 7). He also attached several letters sent by his attorney to the IRS describing Plaintiff's difficulty in closing his loan due to the presence of the tax liens. (Def. Ex. L, Doc. 11-14 at 51, 81). He estimated his damages totaled $5 million. Plaintiff concluded the April 6 and May 16 letters by requesting that the IRS "advise the undersigned" if "for any reason this letter fails to meet the requirements of notice to the government under the FTCA."[2] Plaintiff asserts that the "government never notified [P]laintiff of its contention that his notice of intention to sue was in any way defective. Instead, a year and a half later on November 7, 2007, the IRS denied [P]laintiff's administrative claim for damages." (Opp. at 10).

The letter denying Plaintiff's claim ("Decision Letter") indicates Plaintiff's claim was denied for two reasons: (1) the claim did not contain "specific and detailed descriptions of the amounts of the damages;" and (2) the liens were filed within the relevant limitations period, since the limitations period was tolled by a bankruptcy petition Plaintiff filed in the interim. (P's Exh. A). The Decision Letter further states, "you are not entitled to request any additional administrative appeals of this decision. However, if you wish to take further action, you may file a civil action for damages under Treasury Regulation 301.7432-1 in Federal District Court." (P's Exh. A).

Plaintiff has now filed such an action, seeking damages for failure to release a tax lien under 28 U.S.C. § 7432, and for unauthorized tax collection activities under 28 U.S.C. § 7433. Plaintiff

---

[2] While the FTCA does not waive sovereign immunity for claims arising out of the assessment and collection of taxes, 28 U.S.C. § 2680(c), Defendant does not argue and the Court does not find that Plaintiff's citation to an incorrect statutory waiver provision is fatal to his claim.

prays for "compensatory damages, fees, costs and out-of-pocket costs and other appropriate relief as the Court [d]eems proper." (Compl. at 9). In particular, Plaintiff claims he lost "a large amount of money" because he was unable to refinance his residence while Defendant illegally maintained tax liens on the property. (Compl. ¶ 13-14).

Defendant argues the action should be dismissed for lack of subject matter jurisdiction because Plaintiff failed to exhaust his administrative remedies, rendering the United States immune from suit. Alternatively, Defendant argues Plaintiff fails to state a claim upon which relief may be granted.

II.

DISCUSSION

A. Sovereign Immunity.

The United States, as sovereign, may not be sued without its consent, and the terms of its consent define the court's jurisdiction to hear the suit. *United States v. Testan,* 424 U.S. 392, 399 (1976), *superceded on other grounds.* If sovereign immunity has not been waived, the suit must be dismissed. *Hutchinson v. United States,* 677 F.2d 1322, 1327 (9th Cir. 1982). Statutory waivers of sovereign immunity are to be strictly construed against such surrender. *Safeway Portland Employees' Fed. Credit Union v. FDIC*, 506 F.2d 1213, 1216 (9th Cir. 1974). Plaintiff bears the burden of demonstrating that sovereign immunity has been waived by the United States. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

Section 7432 waives sovereign immunity of the United States over the IRS's intentional or negligent failure to release a tax lien. Specifically, Section 7432 provides that if: "any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under [26 U.S.C. § 6325] on property of [a] taxpayer," the taxpayer may "bring a civil action for damages against the United States in a district court of the United States." 26 U.S.C. § 7432(a). The taxpayer may recover "actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained, plus . . . the costs of the action." 26 U.S.C. § 7432(b)(1)-(2). No such damages, however, may be awarded unless "the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 26 U.S.C. § 7432(d)(1). Exhaustion of administrative remedies is therefore a

jurisdictional prerequisite to maintaining an action in federal court. Further, pursuant to the statute, "the court determines" whether the plaintiff has exhausted his administrative remedies.

The Treasury Regulations elaborate upon the exhaustion requirement and describe the administrative remedies referenced in Section 7432. Pursuant to those regulations, a taxpayer may maintain an action in a federal court after "the date a decision is rendered on a claim *filed in accordance with paragraph (f)* of this section." 26 C.F.R. § 301.7432-1(e)(1)(i) (emphasis added).[3] Paragraph (f) requires the taxpayer to submit "an administrative claim for actual, direct economic damages . . . in writing to the district director (marked for the attention of the Chief, Special Procedures Function) in the district in which the taxpayer currently resides or in the district in which the notice of federal tax lien was filed." 26 C.F.R. § 301.7432-1(f). It further provides that the claim include contact information for the taxpayer, a copy of the lien, a copy of the request for release of the lien, the "grounds, in reasonable detail, for the claim," a "description of the injuries incurred by the taxpayer filing the claim," the "dollar amount of the claim, including damages that have not yet been incurred but that are reasonably foreseeable," and the taxpayer's signature. *Id.*

Plaintiff initiated administrative review of his Section 7432 claim through his letters of April 6 and May 16, 2006.[4] The Decision Letter addressed Plaintiff's Section 7432 claim, expressly rejecting Plaintiff's contention that the liens were filed outside the statutory limitations period. It also indicated Plaintiff could seek no further administrative relief.

Although a decision *was* rendered on Plaintiff's administrative claim, Defendant nonetheless argues the Court lacks subject matter jurisdiction because Plaintiff's claim did not conform with the requirements of paragraph (f) of the Treasury Regulation. In particular, Defendant argues that although the administrative claim contained the dollar amount of the claim, it was deficient because it did not include a "detailed description of the injuries suffered" as required by Treasury Regulation § 301.7432-

---

[3] A plaintiff also may maintain an action 30 days after an administrative claim is filed in accordance with paragraph (f) of this section. 26 C.F.R. § 301.7432-1(e)(1)(ii). The Court need not reach the applicability of this section, since a decision was rendered on Plaintiff's claim.

[4] Although Plaintiff has referred to a Section 7433 claim (unauthorized tax collection activities) in his pleadings, he never filed an administrative claim seeking such relief with the IRS. *See* Opp. at 10 (citing only to Plaintiff's notice of intent to sue the United States "pursuant to IRC § 7432.") Accordingly, Plaintiff's Section 7433 claim is dismissed.

1(f)(2). (Mot. at 6). Accordingly, Defendant argues Plaintiff's administrative claim was not "filed in accordance with paragraph (f) of this section," and thus the Court lacks subject matter jurisdiction over this action.

In support of this position, Defendant cites the well-established maxim that statutory waivers of sovereign immunity are "to be strictly construed against such surrender [of immunity]." *Safeway Portland Employees Fed. Cred. Union v. F.D.I.C.*, 506 F.2d 1213, 1216 (9th Cir. 1974). Here, however, there is no dispute that Plaintiff's claim falls within Section 7432, which allows claimants to sue the United States if an IRS employee negligently or intentionally fails to release a tax lien. 26 U.S.C. § 7432(a). The only issue is whether the alleged procedural deficiency in Plaintiff's underlying claim may, even after a decision has been rendered on the merits of the administrative claim, bar Plaintiff's right to sue the United States.

Defendant argues it may, but the Court respectfully disagrees because Plaintiff's alleged procedural deficiency did not prevent a review on the merits by the agency. True, regulations setting forth claims procedures are often strictly construed, effectively denying jurisdiction where a claimant has not complied with technical provisions of applicable regulations. *See, e.g., Venen v. United States*, 38 F.3d 100, 103 (3d Cir. 1994) ("The failure to comply [with a regulation requiring a written request addressed to the district director rather than an IRS agent] deprives a court of jurisdiction even though the IRS has received actual notice of the claim and never informs the taxpayer of the proper procedures."); *Amwest Surety Ins. Co. v. United States*, 28 F.3d 690, 696 (7th Cir. 1994) (claim deemed ineffective to toll statute of limitations when it was sent to an agent rather than the director.) However, in both *Venen* and *Amwest*, as a result of the defects in the claims, the IRS never had the opportunity to consider the claim through its usual channels. In such circumstances, where a claim is sent to the wrong person within an agency, mere notice to the agency as a whole is insufficient to "trigger administrative review." *Venen*, 38 F.3d at 103. Here, in contrast, Plaintiff's administrative claim not only triggered review; it resulted in a decision on the merits. In *Amwest*, the Seventh Circuit explicitly acknowledged, "[i]f the record before us had demonstrated that the proper person in the IRS had assumed control of [plaintiff's] request, we might have a different result." 28 F.3d at 697. So it is here.

The text of the Decision Letter plainly reveals the IRS in fact rendered a decision on the merits of Plaintiff's claim. The Decision Letter clearly indicates that the IRS evaluated the merits of the claim and determined the contested liens were filed within the requisite statute of limitations, thereby rejecting Plaintiff's claim on the merits. Indeed, the Letter (a) informs Plaintiff that he is "not entitled to request any additional administrative appeals of this decision," and (b) instructs him to "file a civil action for damages . . . in Federal District Court" if he wishes to "take further action." Defendant has offered no evidence or persuasive argument that Plaintiff's alleged failure to describe his damages in detail affected the IRS's ability to render its decision on the merits of Plaintiff's statute of limitations claim.

The Court declines to interpret Section 7432 and the attendant regulations to permit the IRS to deny an administrative claim on the merits, inform the Plaintiff that his only remaining remedy is a federal lawsuit, then later revisit the underlying claim after a federal lawsuit is filed to assert an alleged procedural defect that vitiates subject matter jurisdiction. Because a decision has been rendered by the agency on the merits of Plaintiff's claim, and such decision purports to be the final administrative remedy available to Plaintiff, Plaintiff has exhausted his administrative remedies in accordance with the requirements of Section 7432.

In addition, the Court finds Plaintiff complied with the procedures set forth in the regulations in any event.[5] Although the Decision Letter indicates Plaintiff's claim was deficient because it did not provide "*specific and detailed* descriptions of the amounts of damages," no such requirement is found in the regulations. Instead, the regulations require only a "*description* of the injuries incurred by the taxpayer filing the claim." Treasury Regulation Section 301.7423-1(f)(2)(v) (emphasis added). Plaintiff articulated the dollar amount of his injuries in his supplemental letter, and in his initial claim

---

[5] Notably, in a related context, the Ninth Circuit has rejected the argument Defendant advances here; *i.e.,* that regulations interpreting such statutes are themselves jurisdictional and thus, compliance with applicable regulations is a jurisdictional prerequisite. *See Warren v. United States*, 724 F.2d 776, 778 (9th Cir. 1984) (plaintiff filed procedurally defective administrative claim under the FTCA – which contains statutory waiver of sovereign immunity conditioned upon exhaustion of administrative remedies – held, although exhaustion of administrative remedies is jurisdictional per statute, the regulations describing claim procedures under FTCA are *not* jurisdictional because they were not passed by Congress and Congress did not authorize the executive branch to promulgate jurisdictional regulations). *Id.* The Court need not decide whether the holding in *Warren* is applicable to this case because Plaintiff's claim complied with the applicable regulation and was sufficient to trigger administrative review.

he explained he would sue for compensatory damages arising out of the delayed closing of escrow and general damages for emotional distress. Defendant's argument that damages for these injuries are not recoverable, even if correct, does not negate the fact that such damages were described in Plaintiff's claim. Accordingly, Plaintiff has exhausted his administrative remedies, and sovereign immunity is waived.

B. Sufficiency of the Complaint.

Assuming subject matter jurisdiction exists, Defendant argues Plaintiff's Section 7432 claim should be dismissed because his damages allegations are insufficient to state a claim. (Mot. at 8). Dismissal is appropriate under Rule 12(b)(6) when the complaint fails to plead sufficient facts stating a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rule 8 requires "only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). Only "special damages" which are "not the natural damages associated with such a claim," *Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1226 (7th Cir. 1995), must be pled with particularity. Fed R. Civ. Proc. 9(g).

Defendant has not argued Plaintiff's damages are "special damages" subject to the higher pleading requirements of Rule 9(g). Defendant also does not argue it did not have "fair notice of what the claim is and the grounds upon which it rests." *See Twombly*, 127 S.Ct. at 1964. Instead, Defendant argues Section 7432 requires Plaintiff to "plead proper 'actual, direct economic damages' sustained as a proximate result of the claimed violation." (Mot. at 8). Defendant argues Plaintiff's entire claim must be dismissed because Plaintiff "failed to provide the actual pecuniary basis [for his damage claim], failed to describe the nature of the 'immense problems' he suffered, and failed to explain how his injuries were more than mere inconvenience." (*Id.*).

The Court finds no such pleading requirement in Section 7432. Generally, damages under Section 7432 are limited to the "actual, direct economic damages sustained by the taxpayer which, but for the officer's or the employee's knowing or negligent failure to release the lien . . . would not have been sustained." 26 C.F.R. § 301.7432-1(a)(1). In addition, "[i]njuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual

pecuniary damages." 26 C.F.R. § 301.7432-1(c)(1). But these limitations on damages speak only to what Plaintiff ultimately is entitled to recover (assuming he establishes liability); they do not alter the notice pleading requirements. Further, Plaintiff does in any event allege Defendant's conduct caused him to retain the services of a forensic accountant, and to spend time and energy pursuing relief. He alleges pecuniary costs in sum of $100,000.00 arising out of the delayed closing of escrow, which he alleges was caused by Defendant's erroneous filing of the subject liens. These allegations are sufficient under Rule 8.

III.

CONCLUSION

For these reasons, Defendant's motion is granted in part and denied in part as follows: (1) the IRS is dismissed as a defendant, and the United States is substituted in its place; (2) Defendant's motion to dismiss Plaintiff's Section 7433 claim is granted; (3) Defendant's motion to dismiss Plaintiff's Section 7432 claim is denied. Because the claim for injunctive relief has been dismissed pursuant to stipulation, only the Section 7432 claim remains.

IT IS SO ORDERED.

DATED: June 5, 2008

HON. DANA M. SABRAW
United States District Judge